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Supreme Court of the United States

OCTOBER TERM, 1998

TIME WARNER ENTERTAINMENT CO., L.P., *ET AL.*,

Petitioners,

v.

PATSY ANN BYERS, *ET AL.*,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeal Of Louisiana, First Circuit

BRIEF OF *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

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American Filming Marketing Association

American Society of Journalists and Authors

Association of American Publishers, Inc.

Authors Guild

California Broadcasters Association

CBS Broadcasting Inc.

Comic Book Legal Defense Fund

Directors Guild of America, Inc.

Fox Broadcasting Company

Freedom to Read Foundation

Independent Producers Association

International Periodical Distributors Association

Los Angeles County Bar

Motion Picture Association of America, Inc.

National Association of Broadcasters

National Association of College Stores

National Broadcasting Company

National Cable Television Association

Periodical and Book Association of America

Producers Guild of America

The Publishers Marketing Association

Recording Industry Association of America, Inc.

Software and Information Industry Association

Video Software Dealers Association

Writers Guild of America, West, Inc.

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STATEMENT OF INTEREST

Amici curiae include the following organizations and entities with a direct interest in the outcome of these proceedings:

A. ABC, Inc., CBS Broadcasting Inc., Fox Broadcasting Company, and National Broadcasting Company own and operate television stations across the country and produce and broadcast television shows and movies that are seen throughout the United States, including Louisiana.

B. The American Booksellers Foundation for Free Expression ("ABFFE") was organized in 1990. The purpose of ABFFE is to inform booksellers and other members of the book industry about the dangers of censorship and to promote and protect the free expression of ideas, particularly freedom in the choice of reading materials.

C. The American Filming Marketing Association ("AFMA") is a non-profit organization whose members produce and license the international rights to independent English-language films. Comprised of 130 members, AFMA members generate international revenues in excess of $1.6 billion annually.

D. The American Society of Journalists and Authors is the national organization of independent non-fiction writers. Its 1000-plus members have an abiding interest in protecting the First Amendment. Many of them also have a particular interest in this case and believe that the magazine articles and books that they write, sometimes detailing violent events, and often optioned and produced as television or theatrical films, are put at risk by the decision below.

E. The Association of American Publishers, Inc. ("AAP") is the national trade association of the U.S. book publishing industry. AAP members include most of the major commercial book publishers in the United States, as well as smaller and non-profit publishers, university presses, and

scholarly societies. Defending freedom of expression is one of the association's top priorities.

F. The Author's Guild, founded in 1912, is a national for-profit association of more than 7,700 professional published writers of all genres. The Guild counts journalists, historians, biographers, and other writers of nonfiction and fiction as members. Guild members have won many awards, including the Pulitzer and Nobel Prizes and National Book awards. Their works are valuable contributions to the creative and intellectual fabric of our society. The Author's Guild works to promote the professional interests of authors in various areas, including freedom of expression. The Author's Guild views this case, and all cases that threaten free expression, as bearing directly on the ability of authors to carry on their business of writing as a livelihood.

G. The California Broadcasters Association ("CBA") represents the 101 television and 629 radio stations of California. For the past 50 years, the CBA has worked to ensure the viability and strength of California's free, over-the-air broadcasting system. The Association acts as a technical and educational resource for the industry, advocates on legislative and regulatory matters, and organizes ongoing public information campaigns. The CBA believes Californians are best served by a broadcasting system that provides programming free of government intervention reflecting local interests and audience choice.

H. The Comic Book Legal Defense Fund ("CBLDF") is a non-profit organization dedicated to defending the First Amendment rights of the American comic book industry. CBLDF represents artists, publishers, and distributors, as well as the broader community of specialty retailers and readers.

I. The Directors Guild of America, Inc. ("DGA") is a non-profit corporation duly organized and existing pursuant to the laws of the State of California. DGA is the duly recognized labor organization and exclusive representative for the purposes of collective bargaining of, *inter alia*, directors, assistant

directors, and unit production managers of theatrical and television motion pictures.

J. The Freedom to Read Foundation is an organization established in 1969 by the American Library Association to promote and defend First Amendment rights, support the rights of libraries to include in their collections and make available to the public any work they may legally acquire, and help shape legal precedent for the freedom to read on behalf of all citizens.

K. The Independent Producer's Association is a non-profit trade association representing independent (non-studio) motion picture and television production companies. The members of the IPA are actively involved in producing entertainment programming for both the United States and the world markets. During 1998, IPA member companies produced more than 100 feature-length motion pictures.

L. The International Periodical Distributors Association is the trade association for the principal national periodical distributors engaged in the business of distributing or arranging for the distribution of paperback books and periodicals to wholesalers throughout the United States for ultimate distribution to retailers and the public.

M. The Los Angeles County Bar was formed in 1878 and incorporated as a mutual benefit non-profit corporation in 1953. It is the largest local voluntary bar in the country, with 85 committees and sections, 22, 844 members, and annual revenue and expenses of more than $10,000,000 and 108 employees. It is dedicated to improving the administration of justice, advancing the interest of the profession and serving the public in law-related ways.

N. The Motion Picture Association of America, Inc. ("MPAA") is a not-for-profit trade association founded in 1922 to promote the interests of the motion picture industry in the United States. The MPAA's members include many of the largest production companies and distributors of filmed entertainment for theatrical, television and home video

distribution. MPAA members distribute motion pictures throughout the United States, including Louisiana, and in some 80 countries around the world. MPAA promotes the interests of the motion picture industry by serving as the advocate for the major production companies and distributors of motion pictures, television programs and home video.

O. The National Association of Broadcasters ("NAB"), founded in 1922, is a non-profit trade association that serves and represents television and radio stations and broadcast networks. NAB acts to protect and enhance the ability of its members to freely disseminate news, public affairs, entertainment and other programming to the American people.

P. The National Association of College Stores ("NACS") is a trade association composed of approximately 3,000 college stores located throughout the United States. NACS fears that, if the decision below stands, its members may be subject to similar lawsuits for literary or non-fiction materials sold by them.

Q. The National Cable Television Association is the principal trade association of the cable television industry in the United States, representing the interests of owners and operators of cable television systems serving over 90 percent of the nation's cable households and over 100 cable program networks.

R. The Periodical and Book Association of America, Inc. is an association of magazine and paperback book publishers who distribute their wares through independent national distributors, wholesalers, and retailers, many of whom conduct business over the Internet.

S. The Producers Guild of America ("PGA") is a non-profit organization that has been in existence since 1950. It represents the interests of a substantial number of individual producers as career professionals in the motion picture and television industries. These are the career professionals who, on an individual basis, initiate, coordinate, supervise and

control, either on their own behalf (entrepreneur producer), or on behalf of an employer (employee producer), all aspects of the motion picture and/or television production process, creative, financial, technological or administrative, throughout all phases from inception to completion, including coordination, supervision and control of all other talents and crafts, subject to the provisions of their collective bargaining agreements and personal services contracts. The PGA bylaws impose an obligation "to cooperate, when necessary, with other groups or organizations having objectives or interests in common with this corporation."

T. The Publishers Marketing Association ("PMA") is a trade association representing more than 3,000 publishers across the United States and Canada. Many of PMA's members are small, independent publishers who publish a variety of works, including many controversial topics or involving experimental approaches to writing, which more mainstream publishers have not acquired. They are concerned about the potential financial impact of the decision below as the result of possibly having to defend baseless claims.

U. The Recording Industry Association of America, Inc. ("RIAA") is a trade association whose member companies produce, manufacture and distribute over 90% of the sound recordings sold in the United States. The RIAA is committed to protecting the free expression rights of its member companies.

V. The Software and Information Industry Association represents approximately 1,400 companies in the software and information industries. The computer software companies are leaders in the creation of enabling technologies for the production and distribution of content, whereas the information companies create, disseminate and facilitate the use of a wide variety of content. The Association's membership thrives in great part because of the wide latitude of expression afforded by the First Amendment of the United States Constitution. Any

undue narrowing of this latitude would have a direct impact on their activities.

W. The Video Software Dealers Association ("VSDA") is the trade association for the home video industry, representing more than 3,500 member companies in North America and 22 countries worldwide, including small independently owned video retailers, large video chains and other associated businesses that comprise the home video industry. VSDA vigorously defends the constitutional and legal rights of its members.

X. The Writers Guild of America, West, Inc. ("WGA") is a labor organization representing approximately 8,500 professional authors of stories and screenplays for theatrical and television motion pictures and interactive technologies. The WGA also represents news writers for radio and television. Writers represented by the WGA perform writing services throughout the United States. As an organization of professional authors, the WGA has dedicated itself to the protection of First Amendment freedom of expression unfettered by intrusive government regulation. The WGA has a significant interest in the vigorous and uniform enforcement of First Amendment rights throughout the nation, and in preventing non-meritorious and costly litigation that would chill creative expression.

INTEREST OF AMICI CURIAE

This brief is submitted on behalf of a broad cross-section of media-related organizations, including many of the largest production companies and distributors of filmed entertainment, broadcast, cable and print news organizations, publishing companies, associations of working journalists and book publishers, and businesses, non-profit organizations and guilds involved in the dissemination of ideas.[1] Amici have a significant interest in this matter because they rely on First Amendment protections to preserve the broadest possible scope for creative and nonfiction content that may at times address violent and disturbing issues. In particular, they believe that the decision below not only violates established Supreme Court precedent but impairs vital First Amendment freedoms in ways that will have a chilling effect on a wide range of constitutionally protected expression. Amici, therefore, submit this brief in support of the petition for certiorari. Amici agree with petitioner that plenary review is warranted in light of the magnitude of the court's errors, and the substantial burdens the decision imposes on First Amendment freedoms. Because amici also believe that summary disposition is appropriate in view of the court's manifest deviation from this Court's precedents, amici set forth, in the alternative, why the Court should consider summary reversal under Supreme Court Rule 16.1.[2]

SUMMARY OF ARGUMENT

The decision below that a plaintiff may survive a motion to dismiss merely by alleging that the creators of a mass

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[1] Written consent of both parties has been filed with the Clerk of the Court. Counsel for amici authored the entire brief, and no party other than amici has made a monetary contribution to the brief.

[2] This provision provides that "[a]fter considering the documents distributed under Rule 15, the Court will enter an appropriate order. The order may be a summary disposition on the merits."

distribution motion picture had a subjective intent to incite viewers to violence grossly distorts the extremely narrow exception to full First Amendment protection carved out in *Brandenburg v. Ohio*, 395 U.S. 444 (1969). No court heretofore has held that the mere subjective intent to incite imminent lawless conduct is actionable. Instead, *Brandenburg* consistently has been held to require direct advocacy, the *objective* circumstances of which demonstrate *both* an intent to incite imminent lawless conduct and a likelihood that such conduct will immediately ensue. Plaintiffs' complaint made no attempt to meet this stringent standard and thus should have been dismissed.

If left intact, the decision will have three pernicious effects – each of which warrants summary reversal of the decision. First, the decision significantly broadens the narrow exception to full First Amendment protection established in *Brandenburg* and erodes the heightened pleading burden litigants must meet to state a claim implicating constitutionally protected expression. Second, the decision undermines the primacy and uniformity of federal constitutional law and creates perverse incentives for litigants to "forum shop" in jurisdictions applying laxer First Amendment standards. Finally, by requiring plaintiffs merely to plead subjective intent, the decision opens the door to a flood of "copy cat" lawsuits based upon facile assertions of intent, which inevitably will prompt self-censorship by content providers. These ramifications will be felt not only by studios but also by a variety of providers of both creative and non-fiction expression. Under the court of appeal's standard, a myriad of entities – from book publishers to newspapers, literary and news magazines to web sites and trade associations – would be exposed to onerous litigation and potential tort liability for discussing or dramatizing violence. This potential damage to fundamental First Amendment values compels amici to support the petition for certiorari.

Even if the defendants' rights could be vindicated by a summary judgment or after a full trial, this possibility –

lessened by the erroneous test the court will be forced to apply – is no reason to leave the decision undisturbed. Rule 16.1 provides for the efficient correction of "palpably clear cases of constitutional error," *Eaton v. City of Tulsa*, 415 U.S. 697, 707 (1974) (Rehnquist, J., dissenting), in order to preserve important constitutional safeguards and the Court's inherent authority. Amici thus respectfully request that the Court grant the petition and summarily reverse the decision below.

ARGUMENT

I. SUMMARY DISPOSITION IS WARRANTED BECAUSE THE COURT EGREGIOUSLY MISAPPLIED SETTLED FEDERAL CONSTITUTIONAL LAW.

The decision of the Louisiana court of appeal is patently erroneous. To survive a motion to dismiss, the court held, a complaint need only allege a single claim: that the defendants "intended to incite viewers of the film to begin, shortly after viewing the film, crime sprees such as the one that led to the shooting of Patsy Byers." (Appendix To Petition For A Writ Of Certiorari ("App.") at 15a.) Once that allegation is accepted as true, "the film 'Natural Born Killers' would fall into the unprotected category of speech directed to inciting or producing imminent lawless action and which is likely to incite or produce such action." (*Id.*) This holding should be overturned.

In permitting the plaintiffs to proceed based only on a conclusory allegation that the defendants had a subjective intent to incite violence without satisfying the other requirements of *Brandenburg* – that (1) defendants directly intended for viewers to commit such violence at once; (2) the utterance was directed at particular and identifiable viewers; and (3) immediate violence was a foreseeable and likely consequence of defendants' expression – the court applied a weaker standard than virtually every other court in the land.

In *Brandenburg*, the Supreme Court overturned the conviction of a Ku Klux Klan leader under Ohio's criminal

syndicalism statute because the statute was not limited to advocacy "directed to inciting or producing imminent lawless action and likely to incite or produce such action." 395 U.S. at 447. In *Hess v. Indiana*, 414 U.S. 105 (1973), a majority of the Burger Court clarified the narrow scope of *Brandenburg*'s incitement to violence exception in reversing a criminal conviction based on the defendant's loud statement that "We'll take the f-----g street later (or again)" as the police tried to disperse antiwar demonstrators from a public street. The defendant's expression did not fall within *Brandenburg*, the Court held, because the speech was "not directed to any person or group of persons" and thus it "cannot be said that [the speaker] was advocating, in the normal sense, any action." *Hess*, 414 at 108-09. Second, the expression was "at worst . . . nothing more than advocacy of illegal action at some indefinite future time" and thus was not directed at, and was unlikely to cause, imminent lawless conduct. *Id.* at 108. In the absence of such a showing, the Court held, Hess' statement could not be construed as "intend[ing] to incite further lawless action on the part of the crowd in the vicinity of the appellant and [as] likely to produce such action." *Id.* In short, under *Brandenburg* and *Hess*, for speech to be denied full First Amendment protection, it must constitute a direct exhortation to an identifiable person or persons to commit violent illegal action at or about the time of the stated expression, with a clear likelihood that such violence will quickly occur. This standard necessarily requires an objective showing of both imminence and the likelihood of immediate lawless action, notwithstanding a speaker's subjective intent. A complaint devoid of such allegations cannot survive First Amendment challenge.

A. Plaintiffs' Complaint Failed To Set Forth The Necessary Allegations Required By *Brandenburg*.

While the court of appeal purported to apply *Brandenburg*, it upheld a complaint that, on its face, did not satisfy a central feature: "imminent" incitement to lawless action. The complaint contained neither (1) an allegation of a close

temporal proximity between the speech in question and the subsequent illegal act, nor (2) a claim that the speech was directed at particular and identifiable viewers.

1. The Complaint Must Allege Immediacy.

Brandenburg's imminence requirement is premised on the view that advocacy is sanctionable only if the speaker effectively "participates" in the violence by directing or instigating it. As Justice Brandeis has stated: "There must be reasonable ground to believe that the danger apprehended is imminent. . . . [E]ven advocacy of violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on." *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring).

The requirement of immediacy serves two crucial purposes, both of which were undermined by the court of appeal's ruling. First, it provides an important mechanism for distinguishing between, on the one hand, assertions of values and facts that because of their expressive nature are part of the deliberative process and thus entitled to full First Amendment protection, and, on the other hand, utterances that, because of their urgent, instrumental or concrete nature, are intended to and deliberately provoke immediate violent response. In the latter circumstance, the speaker's expression blends conduct and speech in such a way that both speaker and hearer participate in concerted illegal activity outside the scope of First Amendment protection, with the speaker in effect the "aider and abettor" of the illicit actions carried out by the hearer. Such expression – tantamount to "an instrumental communication as part of a course of action"[3] – may be "constitutionally punished only when the communication is so

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[3] Charles Fried, *The Oliver Wendell Holmes Devise Lecture: Perfect Freedom, Perfect Justice*, 78 B.U. L. Rev. 717, 746 n.35 (1998).

close, direct, effective, and instantaneous in its impact that it is part of the action."[4] As one commentator has stated: "[W]hen words are used to join a conspiracy, to give orders, or to supply instructions in furtherance of some criminal scheme. . . . the law has understood that the words are not being used to express an idea or an attitude so much as they serve as signals and actions."[5]

The second purpose of *Brandenburg*'s immediacy requirement is to separate expression that merely advocates violent action from expression that is so imperative and concrete as to deny listeners the opportunity for a reasoned deliberative response; only the latter category, which by its urgent nature overwhelms rationality, presents a credible threat to public order. *See Whitney*, 274 U.S. at 376 (Brandeis, J., concurring) ("If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.").[6]

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[4] Kent Greenawalt, *Speech and Crime*, Am. B. Found. Res. J. 645, 751 (1980) (quoting Thomas Irwin Emerson, *The System of Freedom of Expression* 404 (1970)).

[5] Fried, *supra*, at 717. For instance, modern penal law traditionally has punished certain utterances without implicating First Amendment values such as specific inducements, threats and orders to commit crimes; agreements and conspiracies to commit crimes; offers to commit criminal acts; and specific training in criminal acts. *See* Greenawalt, *supra*, at 742-47. As the Iowa Supreme Court stated in response to defendants' claim that their conviction for conspiring to fix prices violated *Brandenburg*: "entering into an agreement to fix prices may hardly be said to be speech, symbolic speech or expression under the ambit of Amendment 1." Greenawalt, *supra*, at 743 (quoting *State v. Blyth*, 226 N.W.2d 250, 265 (Iowa 1975)).

[6] *See also* E. Barrett Prettyman, Jr. & Lisa A. Hook, *The Control Of Media-Related Imitative Violence*, 38 Fed. Comm. L.J. 317, 376 (1987) ("Prettyman & Hook") ("Where sufficient time exists for rebuttal and

(Cont. ...)

Brandenburg's immediacy requirement thus serves as an important gatekeeper of First Amendment freedoms, ensuring that only advocacy that provokes immediate illegal acts is subject to governmental sanction. This standard recognizes that "the mere abstract teaching . . . of the moral proprietary or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action." *Noto v. United States*, 367 U.S. 290, 297-98 (1961).

In this case, plaintiffs' conclusory allegation that defendants intended viewers to commit crime sprees "shortly after repeatedly viewing" the movie was insufficient on its face to satisfy *Brandenburg's* immediacy test. This is clear both from the case law and the facts alleged. Indeed, according to the plaintiffs' own recitation of the facts, the perpetrators did not commit the crime in question until after "travelling cross-country to Louisiana" – a joy ride that necessarily involved considerable delay. (App. at 33a.) But, as indicated above, *see supra* at 5-7, the immediacy requirement mandates virtually contemporaneous lawless action. *See* Prettyman & Hook, *supra*, at 377 ("*Brandenburg* requires the advocacy to be so closely related to the harmful action that more speech could not have prevented the harm."). For instance, in *Hess*, the Court accepted the state court's view that the defendant's use of the word "later" meant that the taking of the street could be performed not immediately but at some subsequent time. As one commentator has noted, "if Hess really did mean to urge illegal action, common sense tells us that 'later' must have meant later during the day of the demonstration; so the opinion seems to mean that in that setting at least, illegal action some hours hence is not imminent." Greenawalt, *supra,* at 651. "Even if 'imminent' contains some degree of flexibility, the

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consideration, the Supreme Court has long assumed that additional speech will prevent the harm.").

term connotes and is used by the Court to suggest a very short time span between an incitement and the hoped-for action." *Id.* Like "later," "shortly after repeatedly viewing" does not connote an immediate inducement to lawless action, as the perpetrators' delayed response confirms.

Moreover, plaintiffs' attempt to add a new gloss on the imminence test by focusing on the impact of repetition finds no support in the case law. In essence, the complaint alleges that defendants intended viewers to watch the movie repeatedly and that this repetition provoked violent imitative crime from its viewers. On this basis alone, the complaint should have been dismissed. Advocacy that does not *on its own* provoke immediate response without repeated viewing does not constitute the kind of expression that is so concrete and imperative as to pose an immediate threat of lawless action. To the contrary, the very need for repetitive viewing implies that the expression is too abstract to induce immediate action and that there is sufficient delay between movie viewings and deed to allow for considered response.

Plaintiffs' further allegation that the perpetrators viewed the movie "sometimes under the influence of mind-altering drugs," (App. at 33a), underscores the deficiency of their pleading, since there was no allegation that the advocacy itself – without the distortions caused by "mind-altering drugs" – induced an immediate violent response. "Merely because art may evoke a mood of depression as it figuratively depicts the darker side of human nature does not mean that it constitutes a direct 'incitement to imminent violence.'" *McCollum v. CBS*, 249 Cal. Rptr. 187, 194 (Ct. App. 1988).

Plaintiffs' claim that the movie "glorifi[ed] . . . violent acts" by depicting criminals as "celebrities and heroes," (App. at 3a, 5a), also failed to meet *Brandenburg*'s objective requirement of a direct inducement to lawless action since, by definition, glorification is an indirect, non-instructive means of

conveying a particular viewpoint. Indeed, the plain meaning of "glorification" is to "bestow[] honor, praise or admiration"[7] – hardly the kind of direct, inducement to immediate lawless action *Brandenburg* requires.

The court's reliance on *Rice v. Paladin Enterprises, Inc.*, 128 F.3d 233 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 1515 (1998), was misplaced. *Paladin* only *confirms* that plaintiffs' claims are barred by the First Amendment. In *Paladin*, the defendant had *stipulated* that "it actually intended to provide assistance to murderers and would-be murderers which would be used . . . 'upon receipt'" of the defendant's books "Hit Man: A Technical Manual for Independent Contractors" and "How to Make a Disposable Silencer." 128 F.3d at 242. Because of the stipulated instrumental nature of defendant's "expression," the court held that it did not involve pure speech but fell within the "speech-act doctrine [that had] long been invoked to sustain convictions for aiding and abetting the commission of criminal offenses." *Id.* at 244. The defendant's books concededly "aided and abetted the murders at issue through the quintessential speech act of providing step-by-step instructions for murder . . . so comprehensive and detailed . . . as if the instructor were literally present with the would-be murderer." *Id.* at 249.

In this case, however, plaintiffs have not alleged, and indeed cannot allege, that the defendants provided the sort of detailed assistance and counseling in how to commit violence present in *Paladin*. The fact that a film may "glamorize[] and thereby indirectly promote[] such conduct," *id.* at 266, does not bring it within the "speech-act" doctrine. As the court in *Paladin* itself noted, "[i]n only the rarest case, as here where the publisher has stipulated in almost taunting defiance that it intended to assist murderers and other criminals, will there be evidence extraneous to the speech itself which would support a

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[7] *Merriam Webster's Collegiate Dictionary* (10th ed. 1995).

finding of the requisite intent." *Id.* at 265. Plaintiffs' complaint clearly did not meet this standard.

2. The Complaint Must Allege An Inducement To Particular And Identifiable Viewers.

Plaintiffs' complaint also failed to satisfy the imminence requirement because there was no allegation that the expression was directed at particular viewers. Speech directed toward everyone in general and no one in particular is not the sort of incitement to imminent illegal action contemplated by *Brandenburg* because the speaker, by definition, has no specific hearers he or she is attempting to compel to action. *See Hess v. Indiana*, 414 U.S. 105, 108 (1975). *See also* Lawrence Tribe, *American Constitutional Law* 848 n.57 (2d ed. 1988).

Because plaintiffs could not credibly allege that a major motion picture company intended to prompt any particular viewer or every single viewer to leave the theater and immediately attack someone in sight, the best they could do was allege that "persons *such as* Edmonson and Darrus" were intended to commit violence. But this group is too broad and amorphous to be the intended subjects of a real and immediate provocation to action. Since the movie was broadly released to millions of viewers around the world – all unknown and unidentifiable to defendants – there is no basis to establish the link between utterer and viewer necessary to satisfy the strict requirements of *Brandenburg*.

Courts across the county consistently have reached the same conclusion. For instance, in *Waller v. Osborne*, 763 F. Supp. 1144, 1150 (M.D. Ga. 1991), *aff'd*, 958 F.2d 1084 (11th Cir. 1992), the court rejected a claim that a teenager committed suicide after repeated exposure to the music of Ozzy Osbourne. Despite the court's belief that it was likely "irresponsible and callous for a musician with a large teenage following . . . to portray suicide in any manner other than a tragic occurrence," the court held that "[t]here is no indication whatsoever that defendants' music was directed toward any particular person or

group of persons." 763 F. Supp. at 1151. Likewise, in *Catholic War Veterans of the United Sates, Inc. v. City of New York*, 576 F. Supp. 71 (S.D.N.Y. 1983), the court dismissed in part on First Amendment grounds a complaint alleging in conclusory terms that the constitutional and civil rights of plaintiffs would be violated by the holding of a "Gay Pride Parade." The court found that the plaintiffs' conclusory allegations that the parade should be blocked "based on the possibility that an *unidentified handful of participants* may engage in unlawful conduct" could not survive First Amendment scrutiny, warranting dismissal of the complaint. 576 F. Supp. at 76 (emphasis added).

In sum, because plaintiffs' complaint failed to allege an inducement to immediate lawless action to an identifiable set of viewers, it could not overcome the insuperable First Amendment bar to tort liability. In a virtually identical lawsuit, a Georgia court reached this very conclusion, as did the trial court in this case.[8] The court below should have done the same.

B. Plaintiffs' Complaint Failed To Allege That Lawless Action Was A Likely And Foreseeable Outcome Of Defendants' Expression.

In addition to its failure to apply faithfully *Brandenburg*'s imminence test, the court also ignored another fatal deficiency in plaintiffs' pleading: its omission of any allegation that violence was the likely and foreseeable result of defendants' expression. *Brandenburg*'s "likelihood" test requires an objective showing that the likely outcome of particular expression was lawless action; without such a likelihood, there can be no immediate threat to public order sufficient to withhold First Amendment protection. As this Court has

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[8] *See Miller v. Warner Bros., Inc.*, No. 96vs117599-F (Fulton Cty. Ga. Dec. 3, 1996) ("the lawsuit, as a matter of law, cannot meet the requirements found in *Brandenburg* v. *Ohio* . . ., which protects statements except direct incitement to imminent unlawful action.") (included at Appendix 1a).

recognized, the "degree of imminence [must be] extremely high before utterances can be punished." *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 845 (1978). *See also Craig v. Harney*, 331 U.S. 367, 376 (1947) ("the danger must not be remote or even probable; it must immediately imperil"); Tribe, *supra*, at 848 n.57 (because there was no evidence in *Hess* that the defendant's remarks "were likely to produce any imminent disorder . . . *Brandenburg*'s second test was not met").

In this case, plaintiffs' complaint failed to include any allegation that violence was a foreseeable and likely outcome of defendants' expression. *See People v. Mighty*, 535 N.Y.S.2d 944, 947 (Rochester City Ct. 1988) (dismissing information charging defendant with inciting to riot because the activity alleged did not create a "clear and present danger of riotous conduct, or intended . . . riot"); *Davidson v. Time Warner, Inc.*, No. V-94-006, 1997 WL 405907, at *21 (S.D. Tex. Mar. 31, 1997) (rejecting plaintiff's claims that defendant's rap music had provoked imitative violent acts because there was no showing that "the illegal conduct . . . would imminently occur after listening to the album"); *Lewis v. Columbia Pictures, Inc.*, No. E011948, 1994 WL 75866, at *3 (Cal Ct. App. Nov. 8, 1994) (dismissing plaintiff's claim that defendant's advertisement for "Boyz 'n the Hood" was actionable since "[s]peech directed to action at some indefinite time in the future is not imminent incitement.").

Indeed, because the expression at issue was disseminated impersonally on a mass basis, it is doubtful that plaintiffs in good faith could have made allegations that met such a standard. To date, virtually every reported case that has found imminent incitement under *Brandenburg* has involved live, direct incitement, which is far more likely than inanimate expression through books, films and television programs to foment a crowd to violence and overcome rational deliberation. *See McCollum v. CBS, Inc.*, 249 Cal. Rptr. 187, 194 (Ct. App. 1988) (neither common sense nor the First Amendment permit

a "rational person" to "mistake musical lyrics and poetry for literal commands or directives to immediate action").

This Court should adhere to the longstanding principle that the fact that a few aberrant individuals may react violently to certain expression does not mean that imminent lawless action is a "likely" outcome as a matter of law. This is particularly true where, as here, the expression at issue is indirect. For instance, in *Cohen v. California*, 403 U.S. 15 (1971), the Court recognized that "[t]here may be some persons about with such lawless and violent proclivities, but that is an insufficient base upon which to erect, consistently with constitutional values, a governmental power to force persons who wish to ventilate their dissident views into avoiding particular forms of expression." 403 U.S. at 23.

To adopt a weaker standard would force content providers to tailor their works to accommodate the most vulnerable and unstable persons in society – an impermissible result in a society constitutionally committed to giving the widest possible breathing space to freedom of expression. *See McCollum*, 249 Cal. Rptr. at 197 ("[I]t is simply not acceptable to a free and democratic society to impose a duty on performing artists to limit and restrict their creativity in order to avoid the dissemination of ideas in artistic speech which may adversely affect emotionally troubled individuals."); *Davidson*, 1997 WL 405907, at *22 ("broadcasters . . . would be chilled into producing only the most mundane, least emotional material").[9]

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[9] As one commentator stated:

> The result of imposing upon television and movie producers the duty of avoiding any scene that could possibly trigger violent reaction in a few individuals would be a timidity and blandness in programming that few of us would be prepared to accept.

Prettyman & Hook, *supra*, at 379.

C. The Court Of Appeal Ignored The Heightened Pleading Burden For Claims Implicating The First Amendment.

The decision below, which permitted plaintiffs' suit to proceed based upon a conclusory allegation directed to only one element of the *Brandenburg* test, contravened the standards for evaluating motions to dismiss, particularly those involving important First Amendment rights. Causes of action that implicate First Amendment values require plaintiffs to meet a higher pleading burden in order to safeguard constitutional rights. As the Ninth Circuit has noted, "the danger that the mere pendency of the action will chill the exercise of First Amendment rights requires more specific allegations than would otherwise be required." *Kottle v. Northwest Kidney Ctrs.*, 146 F.3d 1056, 1063 (9th Cir. 1998), *pet. for cert. filed*, 67 U.S.L.W. 3364 (U.S. Nov. 17, 1998) (No. 98-810). *See also National Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 264-65 (1994) (Souter, J., with whom Kennedy, J., joins, concurring) (citing with approval a case applying a higher pleading standard for claims involving presumptively protected First Amendment expression).

For this reason, unlike pleadings in other contexts, no liberal construction generally is accorded complaints implicating the First Amendment. *See* 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1245, at 302 (2d ed. 1990) ("[T]he standard for successfully pleading defamation tends to be more stringent than ordinary civil suits because of the unfavored nature of this type of action and the desire to discourage what some believe to be basically vexatious litigation."). For instance, in *National Bowl-O-Mat Corp. v. Brunswick Corp.*, 264 F. Supp. 221 (D.N.J. 1967), the court dismissed a defamation counterclaim in part because the defendant failed "to set out the alleged defamatory statements with sufficient particularity to allow the court to determine if they would support the action." 5A Wright & Miller, *supra*, § 1357, at 359. "If the court had applied the usual liberal

standard for construing a complaint, it probably would have assumed, for purposes of the motion, that the statements were defamatory. . . ." *Id.*

In this case, the court's failure to apply a heightened pleading burden and a narrow construction to plaintiffs' complaint trampled impermissibly on First Amendment values. The court blithely accepted plaintiffs' conclusory allegations and "footless conclusions of law," *Ryan v. Scoggin*, 245 F.2d 54, 57 (10th Cir. 1957), when the proper disposition was dismissal. By concluding that plaintiffs' woefully deficient allegations survived defendant's motion to dismiss, the court of appeal not only failed to give any weight to defendant's First Amendment interests but also subverted the traditional pleading requirement that claims for relief must be supported by factual allegations and not mere conclusory assertions. Even outside of the First Amendment context, courts consistently have dismissed pleadings that failed to plead factual allegations necessary to support a cognizable claim. *See, e.g., Jackson v. Nelson*, 405 F.2d 872 (9th Cir. 1968) (dismissing a civil rights complaint for failure to state a claim when the complaint contained conclusory statements); *Sutton v. Eastern Viavi Co.*, 138 F.2d 959, 960 (7th Cir. 1943) ("No claim for relief is stated if the complaint pleads facts insufficient to show that a legal wrong has been committed. . . ."); *Davis v. City of Portsmouth*, 579 F. Supp. 1205, 1210 (E.D. Va. 1983) ("[M]ore detail often is required than the bold statement by plaintiff that he has a valid claim of some type against defendant."), *aff'd*, 742 F.2d 1448 (4th Cir. 1984). *See also* 5A Wright & Miller, *supra*, § 1357, at 319-20 ("[T]he court will not accept conclusory allegations concerning the legal effect of the events plaintiff has set out if these allegations do not reasonably follow from his description of what happened, or if these allegations are contradicted by the description itself."). The same disposition was compelled here.

II. THIS COURT SHOULD SUMMARILY REVERSE THE DECISION BELOW.

As indicated above, amici believe that plenary review is warranted because of the failure of the court of appeal to apply settled federal constitutional law and the harmful effects this decision will have. As an alternative to full briefing and oral argument on the merits, however, amici urge the Court to consider summary reversal of the decision under Rule 16.1.

A. Summary Reversal Is Consistent With The Court's Previous Application of Rule 16.1.

Where, as here, a lower court clearly has misapplied established Supreme Court precedent, this Court frequently has granted a petition for purposes of summary disposition without a full hearing on the merits. *See, e.g., Olden v. Kentucky*, 488 U.S. 227 (1988); *Pennsylvania v. Bruder*, 488 U.S. 9 (1988); *Chappelle v. Greater Baton Rouge Airport Dist.*, 431 U.S. 159 (1977). As one former Chief Justice has stated: "There are many instances where the Court, without granting plenary review, has summarily reversed, remanded or taken other direct action to achieve what the Justices conceived to be essential justice."[10] *See also* Robert L. Stern *et. al.*, *Supreme Court Practice* 247 (1993) ("This kind of reversal order usually reflects the feeling of a majority of the Court that the lower court result is so clearly erroneous, particularly if there is a controlling Supreme Court precedent to the contrary, that full briefing and argument" is unnecessary.).

Summary disposition is particularly appropriate where a state court has misunderstood or disregarded federal law since "the Supreme Court is the only tribunal with power to oversee

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[10] Warren, *The Proposed New 'National Court of Appeals,'* 28 Rec. A.B. City N.Y. 627, 640-41 (1973), *cited* in Arthur D. Hellman, *Error Correction, Lawmaking, and the Supreme Court's Exercise of Discretionary Review*, 44 U. Pitt. L. Rev. 795, 801 (1983).

compliance by state courts with the dictates of the federal Constitution and laws."[11] "If the Court, by failing to correct error when it has the opportunity to do so, allows state courts to deny federal rights, the supremacy clause could easily become little more than an exhortation."[12] Such a concern is most acute where fundamental rights are at stake.

This Court's per curiam decision in *Watts v. United States*, 394 U.S. 705 (1969), is instructive. In *Watts*, during a public rally at the Washington Monument, the speaker, in protesting the draft, stated that "[i]f they ever make me carry a rifle, the first man I want to get in my sights is L.B.J." 394 U.S. at 706. Agreeing with the defendant that the statement was nothing more than "a kind of very crude offensive method of stating a political opposition to the President," *id.* at 707, the Court summarily reversed the conviction. As in this case, the Court noted that "[w]hat is a threat must be distinguished from what is constitutionally protected speech." *Id.*

Likewise, in *Moore v. Arizona*, 414 U.S. 25 (1973), the Supreme Court summarily disposed of a decision of the Arizona Supreme Court affirming a denial of a pretrial writ of habeas corpus to a defendant alleging a speedy trial violation. The Court granted the petition and vacated the judgment on the ground that the court improperly had held that prejudice was the "sole touchstone" for proving a speedy trial violation in contravention of previous precedents. 414 U.S. at 26. *Moore* is perfectly analogous to this case, in which the Louisiana court

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[11] Hellman, *supra*, at 801 n.34.

[12] *Id. See also National Bank of N. Am. v. Associates of Obstetrics & Female Surgery, Inc.*, 425 U.S. 460 (1976) (summarily reversing a state court decision holding that the venue provision of the National Bank Act were permissive rather than exclusive in contravention to Supreme Court precedent); *Pease v. Hansen*, 404 U.S. 70 (1971) (summarily reversing a state court decision improperly applying an equal protection precedent).

of appeal improperly held that an allegation of subjective intent was the "sole touchstone" for satisfying *Brandenburg*.

B. Summary Reversal Is Necessary To Safeguard Important Constitutional Rights.

In addition to being consistent with previous applications of Rule 16.1, summary reversal is necessary to preserve vital First Amendment rights. If left undisturbed, the decision will cause three significant constitutional harms. First, in eroding the heightened pleading requirements litigants must meet to fit within *Brandenburg*, the decision impermissibly subjects previously fully protected expression to governmental sanction. In so doing, the decision recasts *Brandenburg* as no longer a narrow, rarely satisfied exception, but rather a general, easily invoked principle – the "exception" that swallows the rule. Such a result significantly reduces the scope of constitutional protection for expressive content, causing a chilling effect on the free and full dissemination of ideas.

Second, the anomalous decision, if left intact, will undermine the uniformity of federal law and permit a state court to trample upon well-established constitutional norms. The deviation of lower courts from fundamental constitutional principles will create uncertainty as to the reach of First Amendment protection and generate perverse incentives for litigants to forum shop in jurisdictions applying less stringent standards.

Finally, by allowing plaintiffs to subject defendants to the continued burdens and costs of litigation, with the attendant likelihood of self-censorship, the decision denies defendants the very protections the First Amendment is designed to provide; continued litigation is *itself* a reduction in First Amendment freedoms. Defending against an action that survives a motion to dismiss or for judgment on the pleadings is onerous. The escalating expenses – financial and otherwise – of discovery and pre-trial procedures are enormous and create a significant incentive to avoid further litigation, either by settling

constitutionally meritless claims, or by avoiding potentially controversial expression in the first instance. The First Amendment does not countenance either result. The Constitution requires courts to protect expression not only against judicial penalization of the speech but equally against legal proceedings that constrict unfettered expression by inducing self-censorship. If plaintiffs unable to meet the stringent *Brandenburg* test can nonetheless impose the costs of litigation on content providers, the protections guaranteed by the First Amendment are by that very fact significantly diminished.

Indeed, such a result will have ramifications not only for motion picture and television companies, but for a variety of other providers of creative and non-fictional material including book publishers, cable companies, newspapers and magazines, web sites and trade and non-profit organizations involved in the dissemination of ideas and information. Under the court of appeal's standard, a variety of works would be subjected to continued litigation and the risk of tort liability. Many such works contain and even arguably glamorize often violent suicides, murders and other brutalities: Shakespearean drama contains 16 suicides; the lead character in *Anna Karenina*, concluding that suicide was the only solution, throws herself under a train; Arthur Miller's Pulitzer prize-winning play, *Death of a Salesman,* depicts suicide as a courageous achievement; and the operas of Puccini, Mannotti and Verdi all contain self-inflicted death. In addition, a variety of seminal movies and television epics -- including *Amistad*, *The Deer Hunter*, *Roots*, *Apocalypse Now*, *Taxi Driver* and *Schindler's List* -- all contain depictions of violence. Yet, if after dissemination of such works, imitative violence occurred, under the court's standard, these content providers would face legal exposure. Such a result would eviscerate traditional First Amendment protections accorded even pernicious or offensive expression. *See, e.g., Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974) ("However pernicious an opinion may seem we depend for its correction not on the conscience of judges

and juries but on the competition of other ideas."); *Winters v. New York*, 333 U.S. 507, 510 (1948) ("Though we can see nothing of any possible value to society in these magazines [stories of "bloodshed and lust"], they are as much entitled to the protection of free speech as the best of 'literature.'").

Even if, as expected, the defendants in this case ultimately prevail on summary judgment or at trial, they will be unable to secure review by this Court of the state appellate court's ruling. That ruling will thus stand, creating a continued source of confusion about the meaning and proper application of this Court's precedents and encouraging "copy cat" suits involving protected expression. Ironically, the Louisiana court of appeal's willingness to permit plaintiffs' case to proceed is exactly the result that the Fourth Circuit in *Paladin* confidently predicted would not occur since "[i]n the 'copy cat context,' it will presumably never be the case that the broadcaster or publisher actually intends, through its description or depiction, to assist another or others in the commission of violent crime." *Rice v. Paladin Enters., Inc.*, 128 F.2d 233, 265 (4th Cir. 1997).

This case poignantly demonstrates why the stringent standards of *Brandenburg* must be vigilantly guarded; a door, once cracked, easily can be pushed wide open. It would be a sad day indeed if the creators of important artistic works with profound impact on American thought and culture were forced to expend considerable time and resources in court defending lawsuits merely because a few aberrant individuals mimicked the powerful scenes depicted. It would be sadder still if, due to fear of tort liability, the most challenging, provocative and dramatic parts of such works were left on the cutting room floor.

CONCLUSION

For the reasons stated above, amici respectfully request that the Court grant the petition on the merits or for purposes of summarily reversing the Louisiana court of appeal's decision.

Respectfully submitted,

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February 5, 1999

APPENDIX

IN THE STATE COURT OF FULTON COUNTY

STATE OF GEORGIA

MARGO MILLER, Individually, and as Administratrix of the Estate of Olin Miller,	:	
Plaintiff,	:	CIVIL ACTION
V.	:	File No. 96vs117599-F
WARNER BROTHERS, INC., TIME WARNER ENTERTAINMENT, L.P., TIME WARNER, INC., WARNER HOME VIDEO, INC., REGENCY ENTERPRISES, INC., IXTLAS COPORATION, INC., J.D. PRODUCTIONS, INC., ALCOR FILMS, OLIVER STONE, RONNIE BEASLEY AND ANGELA CROSBY,	:	
Defendants.	:	

ORDER

This matter came before the Court for oral argument on the motion to dismiss filed by Defendant Time Warner Entertainment Company, L.P. on its behalf and also on behalf of Defendants Warner Home Video and Warner Brothers. Having heard oral argument, considered the briefs and

reviewed the file, the Motion is GRANTED and the case is dismissed on the pleadings as to the above-named Defendants.

This lawsuit, as a matter of law, cannot meet the requirements found in *Brandenburg v. Ohio*, 395 U.S. 444 (1969), which protects statements except direct incitement to imminent unlawful action. *See Walt Disney Productions, Inc., v. Shannon*, 247 Ga. 402 (1981).

Also, Plaintiff's allegations of subliminal flash frame stimuli claim only that Defendants used them to intentionally entice individuals to view the movie more than once so as to be more profitable and to increase the effect of the movie's message. Neither of these results, even if proven at trial, is motionable, particularly in Georgia where the state constitution is even broader than the First Amendment and where lawsuits seeking to impose liability on speech are disfavored.

SO ORDERED, this 3rd day of December, 1996.

MELVIN K. WESTMORELAND, JUDGE
STATE COURT OF FULTON COUNTY